

I. INTRODUCTION

On July 1, 1991, the Pipeline Safety and Engineering Division ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to R.J. Cincotta Co., Inc. ("Respondent"), alleging that, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"), the Respondent failed to give proper notification to the operators of underground utilities prior to excavating in an area overlying such facilities. The excavation resulted in damage to a two-inch steel main owned by Commonwealth Gas Company ("ComGas") adjacent to the intersection of Floral Street and Checkerberry Lane in Shrewsbury, Massachusetts.

The NOPV informed the Respondent that it had the right to appear before a Division hearing officer in an informal conference on July 29, 1991, at the Department's offices. The NOPV also stated that the Respondent could submit a written reply by July 29, 1991, instead of appearing at the hearing (Exh. Div-2).

On August 7, 1991, the Respondent answered by letter and denied that it had violated the Dig-Safe Law (Exh. Div-3). The Division answered in a letter dated August 28, 1991, confirming the conclusions of the NOPV (Exh. Div-4). The Respondent was dissatisfied with the informal decision and requested an adjudicatory hearing before the Department (Exh. Div-5). After

due notice, an adjudicatory hearing was held on October 24, 1991, pursuant to the Department's procedures for enforcement of G.L. c. 82, § 40 (220 CMR Part 99.00 et seq).

The Division presented one witness, Mario Reid, Compliance Officer for the Division, and offered the following exhibits as evidence: the damage report (Exh. Div-1); the NOPV (Exh. Div-2); the Respondent's reply to the NOPV (Exh. Div-3); the informal decision (Exh. Div-4); the Respondent's letter requesting an adjudicatory hearing (Exh. Div-5); and a letter from ComGas to the Division (Exh. Div-6). The Respondent offered testimony and one exhibit: a letter from R.J. Cincotta to ComGas (Exh. C-1). The Department accepted all exhibits offered as evidence.

II. DISCUSSION

The Division received a report of a Dig-Safe violation from ComGas which indicated that the Respondent damaged a two-inch steel main on May 18, 1991, near the intersection of Floral Street and Checkerberry Lane in Shrewsbury (Exh. Div-1). The NOPV alleged that the Respondent failed to give adequate notification and exercise reasonable precautions to avoid damage to an underground utility (Exh. Div-2). The Respondent's project consisted of excavating for sewer line installations (Exh. Div-1; Tr. 10).

In support of the Division's allegations, Mr. Reid stated that it is the Division's position that the Respondent was

operating without a valid Dig-Safe number at the time the accident occurred (Tr. 24). Prior to the hearing, the Division had argued that the Respondent had not provided any Dig-Safe notification for the location in question (id.). At the hearing, however, Mr. Cincotta stated that he had obtained a Dig-Safe number in the fall of 1990, and provided the number to the Department subsequent to the hearing (Tr. 12, 17-18; DPU RR-1). In response to this information, Mr. Reid stated that even if the Respondent had obtained a proper Dig-Safe number in November 1990, that number would not have been valid at the time of the accident because there had been a four month hiatus at the work site by the Respondent (Tr. 24).

In response to the Division's allegations, Mr. Cincotta stated that a proper Dig-Safe request had been made in the fall of 1990, that he is familiar with the requirements of the Dig-Safe Law, and that he understood this number to be valid in May of 1991 (Tr. 17-18). Mr. Cincotta also stated that the amount of the fine sought by the Division, \$1000, would present a financial hardship for him (Tr. 18).

III. ANALYSIS AND FINDINGS

The Department must determine if the Respondent failed to tender proper notification prior to excavating in an area overlying underground utilities. G.L. c. 82, § 40 provides in part:

No person shall, except in an emergency, contract for, or make an excavation...unless at least seventy-two hours...but not more than thirty days, before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation....

As has been noted by the Department in previous decisions, the purpose of the Dig-Safe Law is to provide the excavator with adequate information pertaining to the location of underground utilities in order to prevent damage to those facilities (See D.P.U. 86-DS-133, p. 5). When the contractor's presence at a site is not continuous, however, a new Dig-Safe notification is necessary to ensure that the marks are visible and current at the site (id.). According to the Respondent's own testimony, his Company left the site for a period of approximately four months (Tr. 17-18). We find that this amount of time was significant enough to require additional Dig-Safe notification, and therefore, the Respondent violated the Dig-Safe Law by failing to make proper notification prior to beginning additional excavation at the site.

The Division has requested that a \$1000 penalty be assessed as this incident represents a repeat violation of the Dig-Safe Law by the Respondent (Tr. 25). However, in response to a Department Record Request, the Division was able to provide only two prior findings of Dig-Safe violations by the Respondent (DPU RR-2). Therefore, the Department finds that a \$1000 fine, the maximum allowed by law, is unwarranted under the circumstances,

and that instead the Respondent shall pay a fine of \$500.

IV. ORDER

Accordingly, after due notice, hearing, and consideration,
the Department

FINDS: That R.J. Cincotta Co., Inc., violated the Dig-Safe Law when it failed to provide proper notification before excavating adjacent to the intersection of Floral Street and Checkerberry Lane in Shrewsbury, Massachusetts on May 18, 1991; and it is

ORDERED: That R.J. Cincotta Co., Inc., shall pay a civil penalty of \$500 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this Order.

By Order of the Department,